

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. LOUIS CARDINALS, LLC

Case

14-CA-213219

and

JOE BELL, an Individual

RESPONDENT'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION AND ORDER
REJECTING SETTLEMENT

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**RESPONDENT'S EXCEPTIONS TO
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Respondent St. Louis Cardinals, LLC ("Respondent" or "Cardinals"), by its undersigned counsel and pursuant to Rule 102.46 of the Board's Rules and Regulations, respectfully files the following Exceptions to the May 15, 2020 Supplemental Decision of Administrative Law Judge ("ALJ") Arthur A. Amchan,¹ and the ALJ's April 8, 2020 Order Rejecting Settlement.²

I. The ALJ Erroneously Contradicted and Subverted the Board's Decision Remanding this Case.

The Board remanded the instant case to the ALJ "for further analysis and findings of whether the Respondent carried its *Wright Line* defense burden" with regard to alleged discriminatees James Maxwell and Eugene Kramer. 369 NLRB No. 3, slip op. at *2 (Jan. 3, 2020).

¹ References to the ALJ's Supplemental Decision are identified by the letter "D" followed by page and line number, e.g., "D. ____." References to the hearing transcript are by the letters "Tr.", followed by page and line number, e.g., "Tr. ____:____." References to exhibits introduced by the General Counsel are by the letters "GC", followed by exhibit number, e.g., "GC-____". References to exhibits introduced Jointly are by the letter "J", followed by exhibit number, e.g., "J-____." Finally, references to exhibits introduced by the Cardinals are by the letters "R-" followed by exhibit number, e.g., "R-____."

² In filing these Exceptions, Respondent does not waive, but rather explicitly preserves, all specific exceptions and defenses raised in its November 14, 2018 Exceptions to the ALJ's initial Decision in this case.

In support of its rebuttal defense under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) (“*Wright Line*”), Respondent excepts:

1. To the ALJ’s conclusion that the Board’s remand in this case “calls into question whether the Board still adheres to” the *Wright Line* standard, because such conclusion is contrary to law. D. 7 n. 9.

2. To the ALJ’s continued reliance on the timing of an offer made to previous alleged discriminatee Thomas Maxwell as evidence of unlawful motives, and failure to find that such offer supports Respondent’s *Wright Line* rebuttal defense, despite the Board’s explicit finding that Respondent did not violate the Act with regard to Thomas Maxwell, because such reliance and failure are contrary to law and contrary to substantial evidence in the record. D. 6:21-26, 8 n. 10; 369 NLRB No. 3, slip op. at *2.

3. To the ALJ’s reliance on testimony regarding prior alleged discriminatee Joe Bell, because such reliance is irrelevant and contrary to substantial evidence in the record. D. 4 n. 5, 8:6-14.

4. To the ALJ’s conclusion that the alleged discriminatees did not lose the protection of the Act by acting in contravention of Section 8(b)(1)(B) of the Act, because this conclusion exceeds the scope of the Board’s remand, and is thus irrelevant and contrary to law. D. 6-7 n. 8.

5. To the ALJ’s treatment of Respondent’s *Wright Line* rebuttal defense as a matter of witness credibility, rather than a matter requiring overall affirmative defense analysis, because such treatment is contrary to law and contrary to substantial evidence in the record. D. 8:2-4.

II. The ALJ Erroneously and Explicitly Discredited Uncontradicted Evidence.

In support of its *Wright Line* rebuttal defense, Respondent excepts:

6. To the ALJ's blanket rejection of uncontradicted evidence in the record, because such rejection is contrary to law, unsupported by record evidence, and contrary to substantial evidence in the record. D. 8:20-29.

7. To the ALJ's conclusion that former Painting Foreman Billy Martin "did not recall painters whose work was substandard" because such conclusion is unsupported by record evidence. D. 8:25-26.

8. To the ALJ's conclusion that the absence of discussions of the specific reasons why Painting Foreman Patrick Barrett did not offer work to James Maxwell and Kramer during a grievance meeting renders such reasons incredible, because this conclusion is unsupported by record evidence and contrary to substantial evidence in the record. D. 8:26-29, 9:3-4, 9:22-25.

III. The ALJ Erroneously Found that Evidence of James Maxwell and Eugene Kramer Smoking Marijuana During the Work Day, Exhibiting Poor Work Performance and Work Ethics, and/or James Maxwell Stating He Could Not Work for Barrett Did Not Establish Respondent's *Wright Line* Rebuttal Defense.

In support of its *Wright Line* rebuttal defense, Respondent excepts:

9. To the ALJ's conclusion that the purported absence of discussions of the specific reasons why Painting Foreman Patrick Barrett did not offer work to James Maxwell and Kramer in a Board affidavit in support of a charge filed by Respondent against Painters District Council Local 58 ("Union") renders such reasons incredible, because this conclusion is unsupported by record evidence and contrary to substantial evidence in the record. D. 9:3-5, 9:22-25.

A. Barrett Would Not Have Offered Work to James Maxwell or Kramer, even Absent any Purportedly Protected Activities, because he Observed Both Smoking Marijuana During the Work Day.

In support of its *Wright Line* rebuttal defense, Respondent excepts:

10. To the ALJ's finding that Barrett did not specify the time of day in which he witnessed James Maxwell and Kramer possessing and using marijuana, and the failure to find that

such events occurred during lunch breaks, because such finding and failure are unsupported by record evidence and contrary to substantial and un rebutted evidence in the record. D. 8:17-18, 8 n. 11.

11. To the ALJ's conclusion that Barrett's testimony regarding Kramer smoking marijuana is incredible because Barrett stated he witnessed this event prior to Kramer's hire, because such conclusion is unsupported by record evidence and contrary to substantial evidence in the record. D. 9:20-21.

12. To the ALJ's failure to find that, prior to making offers of work, Barrett personally observed both James Maxwell and Kramer smoking marijuana during the work day, because such failure is contrary to substantial and un rebutted evidence in the record. (Tr. 323-24).

B. Barrett Would Not Have Offered Work to James Maxwell or Kramer, Even Absent Any Purportedly Protected Activities, Because He Observed James Maxwell Exhibiting Poor Work Ethic, and He Observed Poor Work Performance by Both James Maxwell and Kramer.

In support of its *Wright Line* rebuttal defense, Respondent excepts:

13. To the ALJ's failure to find that, prior to making offers of work, Barrett personally observed that James Maxwell went "missing quite a bit" at work, because such failure is contrary to substantial and un rebutted evidence in the record. (Tr. 322).

14. To the ALJ's failure to find that, prior to making offers of work, Barrett personally observed that James Maxwell sometimes slept on the clock, because such failure is contrary to substantial and un rebutted evidence in the record. (*Id.*).

15. To the ALJ's failure to find that, prior to making offers of work, Barrett personally observed that James Maxwell sometimes painted while sitting in a chair, because such failure is contrary to substantial and un rebutted evidence in the record. (Tr. 51-52, 322) (R-6(a)) (photograph of Maxwell painting while sitting on a folding chair).

16. To the ALJ's failure to find that, at the time of Barrett's offers of work, he viewed painting while sitting down in a chair as "very unprofessional", because such failure is contrary to substantial and un rebutted evidence in the record. (Tr. 322).

17. To the ALJ's failure to find that, prior to making offers of work, Barrett personally observed work by James Maxwell that Barrett viewed as "sloppy", because such failure is contrary to substantial and un rebutted evidence in the record. (*Id.*).

18. To the ALJ's failure to find that, prior to making offers of work, Barrett personally observed that Kramer performed poorly, both at Respondent's Stadium and for contractor Shamel Construction, because such failure is contrary to substantial and un rebutted evidence in the record. (Tr. 295-96, 326). (*See also* Tr. 250-51) (corroborating testimony from Shamel Construction's owner describing need to refinish hardwood floors due to Kramer's deficient work).

19. To the ALJ's failure to find that, prior to making offers of work, Barrett personally observed that Kramer's deficient work for Shamel Construction required a large amount of time to fix, because such failure is contrary to substantial and un rebutted evidence in the record. (Tr. 326).

20. To the ALJ's failure to find that, prior to making offers of work, Barrett personally observed that Eugene Kramer's work resulted in evidence of uneven paint, colloquially known as, "skippers", because such failure is contrary to substantial and un rebutted evidence in the record. (Tr. 295-96).

21. To the ALJ's finding that Barrett did not work with Kramer for Shamel Construction and did not help clean up Kramer's errors, because such finding is unsupported by record evidence and contrary to substantial and un rebutted evidence in the record. D. 9:10-15.

C. Barrett Would Not Have Offered Work to James Maxwell, Even Absent Any Purportedly Protected Activities, Because He Knew James Maxwell Had Said He Would Not Work for Barrett.

In support of its Wright Line rebuttal defense, Respondent excepts:

22. To the ALJ's failure to find that, at the time of Barrett's offers of work, he knew James Maxwell had expressed unwillingness to work for Barrett upon learning that Barrett was named Painting Foreman. (Tr. 32, 57-59, 256-58, 324-25) (statement admitted by Maxwell at Tr. 32, 57-59, Maruyama confirms conveyance of statement to Barrett at Tr. 256-57, and Barrett confirms his knowledge at Tr. 324-25).

23. To the ALJ's conclusion that a purported inability of Barrett to recall dates related to James Maxwell's statement that he "would not work for" Barrett makes the statement "irrelevant even if true" because such conclusion is erroneous, unsupported by record evidence, and contrary to substantial evidence in the record. D. 4:1-17, 4 n. 4.

D. Each of the Individual Reasons for Barrett's Decision to Offer Positions on His Crew to Other Painters Establishes an Independently Sufficient Basis to Find Respondent Satisfied Its *Wright Line* Rebuttal Burden.

In support of its Wright Line rebuttal defense, Respondent excepts:

24. To the ALJ's conclusion that Barrett's legitimate reasons for not offering work to James Maxwell and Kramer did not concern Barrett until they filed internal Union charges against him, because such conclusion is unsupported by record evidence, and contrary to substantial evidence in the record. D. 9:5-6, 9:16-18, 9:22-25.

IV. The ALJ Erroneously Failed to Find Barrett Possessed Superior Options in His Selection of Painters.

In support of its *Wright Line* rebuttal defense, Respondent excepts:

25. To the ALJ's conclusion that Barrett's testimony does not establish that his other painter options, particularly Dwayne Oehman, were more qualified than James Maxwell and Kramer, because this conclusion is contrary to substantial evidence in the record. D. 6:16-19.

26. To the ALJ's failure to find that, at the time of Barrett's offers of work, he knew Mark Ochs, Michael Burns, Tim O'Neil, Bruce Noss, Dave Sobkoviak, and Duane Oehman had demonstrated strong work abilities, either to Barrett directly or to others whom Barrett trusted, because such failure is unsupported by record evidence, and contrary to substantial and un rebutted evidence in the record. (Tr. 319-21).

27. To the ALJ's failure to find that Respondent hired Angie Ramshaw to its 2018 painting crew pursuant to an apprenticeship program with the Union, because such failure is unsupported by record evidence, and contrary to substantial and un rebutted evidence in the record. (Tr. 280, 321).

28. To the ALJ's failure to find that Barrett never witnessed any of the individuals hired to the 2018 painting crew using marijuana during the work day, because such failure is unsupported by record evidence, and contrary to substantial and un rebutted evidence in the record. (Tr. 327).

V. The ALJ Erroneously Found a Variety of Irrelevant Factors Constrained Barrett in His Selection of His Painting Crew.

In support of its *Wright Line* rebuttal defense, Respondent excepts:

29. To the ALJ's conclusion that prior practices by Respondent limited Barrett's full discretion to hire his painting crew, and failure to find that Barrett possessed full discretion in hiring his crew, because such conclusion and failure are unsupported by the record and contrary to substantial evidence in the record. D. 3:20-24, 10:5-14.

30. To the ALJ's conclusion that former Painting Foreman Billy Martin's practices constrained the discretion of Barrett and/or Respondent overall in filling the painting crew, because

such conclusion is unsupported by the record and contrary to substantial evidence in the record. D. 3:2-9, 3:19-23, 8:24-25.

31. To the ALJ's finding that Respondent employed James Maxwell as a "full-time" painter, because such finding is unsupported by the record and contrary to substantial evidence in the record. D. 2:39-39, 2 n. 2.

32. To the ALJ's conclusion that standard security background check letters issued to the alleged discriminatees prior to Barrett's appointment as Painting Foreman constrained Barrett's discretion in filling the painting crew, because such conclusion is unsupported by the record and contrary to substantial evidence in the record. D. 3:14-19, 3 n. 3, 9:40-10:14.

33. To the ALJ's conclusion that Barrett's hiring of his painting crew through means other than the Union's hiring hall undermines Respondent's *Wright Line* rebuttal defense, because such conclusion is unsupported by the record and contrary to substantial evidence in the record. D. 6:5-16.

VI. The ALJ Erroneously Rejected a Full Settlement of the Allegations Regarding Eugene Kramer after Kramer Rendered Himself Ineligible for Reinstatement Through Threats of Violence Against Barrett and Respondent's Legal Representatives.

In support of its contention that, absent dismissal of the allegations regarding Kramer, the Board should reverse the ALJ's rejection of a Settlement Agreement executed by the General Counsel and Respondent regarding Kramer's allegations, Respondent excepts:

34. To the ALJ's April 8, 2020 Order Rejecting Settlement in response to the General Counsel and Respondent's Joint Motion for Administrative Law Judge to Approve Compliance Agreement and Request for Order to Show Cause, because such rejection is contrary to substantial evidence in the record and contrary to law.

35. To the ALJ's May 8, 2020 Order Rejecting Respondent's Motion for Reconsideration of Order Rejecting Settlement, because such rejection is contrary to substantial evidence in the record and contrary to law.

36. To the ALJ's adherence to his prior rejections of the Settlement Agreement in his ALJD. D. 1-2 n. 1.

37. To the ALJ's failure to find that Kramer's threats of severe physical violence against Barrett and Respondent's counsel, as documented in a Federal Protective Services Report attached to Respondent's Motion for Reconsideration, renders Kramer ineligible for reinstatement, because such failure is contrary to substantial evidence in the record and contrary to law. Motion for Reconsideration, Exhibit 3.

VII. The ALJ Erroneously Issued a Recommended Order and Remedies.

Because the ALJ erred in his overall Supplemental Conclusion of Law, in the issuance of a Recommended Order and Remedies, and with regard to the specific remedies contained therein, Respondent excepts:

38. To the ALJ's conclusion that Respondent failed to establish its *Wright Line* rebuttal defense because this finding is contrary to law and contrary to the substantial evidence in the record, and is unsupported by the record. D. 6:28-32, 7:19, 9:36-38.

39. To the ALJ's finding that Respondent violated Section 8(a)(1) and (3) of the Act with regard to James Maxwell and Kramer, because this finding is contrary to law and contrary to the substantial evidence in the record, and is unsupported by the record. D. 10:18-19.

40. To the ALJ's issuance of remedies, because any remedy is contrary to law and contrary to the substantial evidence in the record, and is unsupported by the record. D.10:21-11:2, Appendix.

41. To the ALJ's issuance of his recommended Order, because any Order, other than an Order dismissing the allegations regarding James Maxwell and Kramer, is contrary to law and contrary to the substantial evidence in the record, and is unsupported by the record. D. 11:4 to D. 12:18, 12 n. 14.

42. To the ALJ's proposed remedy that Respondent compensate James Maxwell and Kramer for any adverse tax consequence of receiving a lump-sum backpay award as prescribed in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), because this remedy exceeds the Board's remedial authority. D. 10:39-11:2.

43. To the ALJ's proposed remedy that Respondent compensate James Maxwell and Kramer through backpay that includes interest compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), because this remedy exceeds the Board's remedial authority. D. 10:26-27, 10:34-35.

44. To the ALJ's proposed remedy that Respondent compensate James Maxwell and Kramer for search-for-work and interim employment expenses because search-for-work and interim employment expenses are a normal and routine aspect of employment in this industry, and this remedy exceeds the Board's remedial authority if such expenses exceed interim earnings. D. 10:27-29, 10:35-37.

Respectfully submitted,

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**ATTORNEYS FOR RESPONDENT
ST. LOUIS CARDINALS, LLC**

Dated: June 12, 2020

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2020 I filed RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION AND ORDER REJECTING SETTLEMENT and BRIEF IN SUPPORT of same via the National Labor Relations Board's E-File system, and via email, to the following parties:

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